UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

L&W ENGINEERING, INC.

and Case 7–CA–53708

CHARMAINE KENNEDY, an Individual

Kelly A. Temple, Esq., for the General Counsel.
Thomas W. H. Barlow and *Tiffany A. Buckley-Norwood, Esqs.,* for the Respondent.

DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. This case was tried in Detroit, Michigan, on October 6, 2011, pursuant to a complaint that issued on August 12, 2011.[1] Minor amendments to the complaint were made at the hearing. The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by forcing the Charging Party to go on medical leave because of her union activities. The answer of the Respondent denies violating the Act. I find that the Respondent did not violate the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, L&W Engineering, Inc, a corporation with an office and facility in Belleville, Michigan, is engaged in the creation, sale, and distribution of parts for the automobile industry. The Respondent, in conducting its business, annually derives gross revenues in excess of $1 million and purchases and receives at its Belleville facility goods valued in excess of $50,000 directly from points outside the State of Michigan. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent stipulated, and I find and conclude, that Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

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[1] All dates are in 2011 unless otherwise indicated. The charge in Case 7–CA–53708 was filed on May 20 and was amended on July 8.

II. Alleged Unfair Labor Practices

A. Facts

There is little or no dispute with regard to the medical facts in this case, many of which are established by joint exhibits. Those exhibits and testimony establish injuries, treatment, and duty restrictions from May 2009 through April 2011 that culminated in Kennedy taking medical leave on May 3. With regard to her medical restrictions, Kennedy dealt with Associate Service Manager Julian Flint. Flint explained that the job the associate service manager performs is the same as a human resources manager.

Charmaine Kennedy began working for the Company on August 5, 1996, as a press operator. In early May 2009, Kennedy experienced pain in her right wrist when stacking parts. She was referred to Concentra Medical Centers, the clinic utilized by the Company. Concentra referred her to Dr. Carlos Villafane who had a CT arthrogram performed on Kennedy's right wrist that revealed "mild tenosynovitis." She was given a brace and was returned to full duty in mid-June 2009.

On August 21, 2009, the tip of Kennedy's left ring finger was crushed between an automation rack and a die. She was again referred to Dr. Villafane who performed surgery. After taking a week of leave, Kennedy returned to work. The crush injury resulted in the loss of 3 millimeters of bone at the tip of her left ring finger. That loss is referred to in a medical report as an "amputation." For about 4 weeks she was restricted to no use of the left hand. Thereafter, that restriction was lifted and Kennedy was permitted to lift up to 3 pounds with her left hand. Kennedy underwent therapy and recalled that, in January 2010, the 3-pound restriction regarding her left hand was raised to 10 pounds. Kennedy was given light duty, sorting and repacking parts. She acknowledged using her left hand when performing that work.

There was no restriction regarding her right hand. Kennedy confirmed that, although she always wore the brace she had been given for the right wrist in May 2009, she did not seek medical treatment for the right hand until another injury in 2011.

On June 30, 2010, Dr. Villafane performed cross finger flap surgery and restricted Kennedy's use of her left hand to no lifting or pushing or pulling above 3 pounds. Kennedy recalled that the surgery was to improve the blood flow to her left ring finger which was still extremely sensitive. Kennedy again received therapy. She continued to perform assigned light duty work consistent with the revised restrictions of Dr. Villafane.

In September 2010, Kennedy requested to consult with a different physician to obtain an opinion about "the treatment that I was receiving from Dr. Villafane, to see if he was doing things properly." She chose to see a Dr. Fritz who examined her on October 4, 2010. Dr. Fritz advised her to "continue on with therapy, wait and see if, in time, things will get better." Dr. Fritz recommended that Kennedy continue to see Dr. Villafane. There is no written report from Dr. Fritz in the record.

When asked whether Dr. Fritz changed her work restrictions, Kennedy answered that she did not go "to have the restrictions changed;" but only for an "opinion" regarding her current treatment. Notwithstanding her receipt of the second opinion from Dr. Fritz, Kennedy requested to see another doctor. Kennedy made no complaint with regard to the examination, but explained that she did not "like that environment. The waiting room was crowded. . . . I had to wait like an hour."

Kennedy sought and was granted approval to see a third physician. On November 11, 2010, she was examined by Dr. Raj Gupta. Dr. Gupta reported, regarding the hand and ring finger, that Kennedy had a “good range of motion “ but was “extremely sensitive at the tip of the left ring finger.” Notwithstanding the absence of restriction in her range of motion, Dr. Gupta stated that it was his opinion that Kennedy was “permanently disabled with this left hand." His report does not set out any work restrictions. It does not note that Kennedy was performing light duty work with her left hand or that she could drive and perform domestic chores. His report does not set out any percentage of disability.

It is clear that Kennedy was not 100 percent disabled with regard to use of her left hand. She acknowledged that, when performing the light duty of repacking parts, she used her left hand. She had no limitations of her thumb and index finger.

The Company’s insurer, having conflicting medical opinions, sought an independent medical evaluation (IME) which was conducted by Dr. B. J. Page, on December 29, 2010.

The report of Dr. Page recites Kennedy’s medical history. The examination revealed atrophy of the left ring finger with a curved fingernail. ”All of her flexor and extensor tendons are functioning.” Dr. Page confirmed that Kennedy experienced extreme sensitivity of the left ring finger.

Dr. Page, consistent with Dr. Villafane, confirmed that Kennedy should not lift, push or pull more than 3 or 4 pounds. He stated his opinion that Kennedy could work “without restriction” if she obtained a finger cap for the ring finger. He questioned the refusal of Kennedy to consider amputation of the first joint of the left ring finger. The sensitivity was at the tip of the finger that had been partially amputated by the crush injury.

Kennedy received a copy of the IME report of Dr. Page. Upon receipt of the IME report, she met with Associate Service Manager Julian Flint. Kennedy expressed her dissatisfaction with the report, specifically the recommendation of amputation. Kennedy denied that a finger cap, also referred to as a gel cap, was mentioned in that conversation.

Flint also received the IME report and confirmed that he and Kennedy spoke about it. Consistent with the report he explained to her, "We have a three-to four-pound restriction with your left hand, but the IME is saying that you can be full duty if you buy a finger cap. You need to go ahead and get a finger cap." Kennedy stated that she would do so, but did not think it would help. I credit Flint. The necessity of her obtaining a finger cap is confirmed by a letter dated January 17 sent by the Company’s insurer to Kennedy advising, consistent with the IME, that “you are capable of performing normal job duties if a finger cap is work [sic, i.e., worn]” and that her claim had “been placed in an inactive status.” Kennedy denied receiving the foregoing letter. Whether she received the letter is immaterial. Flint told her, “You need to go ahead and get a finger cap."

Kennedy admitted that Flint spoke with her regarding obtaining a finger cap in “at least two" conversations. She later acknowledged that there may have been four or five conversations regarding a finger cap. Flint recalled, in testimony that Kennedy did not deny, that on four or five occasions, “every couple of weeks,” he asked Kennedy whether she had “got the finger cap yet?" Kennedy claims to have unsuccessfully sought to obtain a finger cap at two pharmacies and, thereafter, ceased any effort to obtain a finger cap.

Although testifying that she ceased trying to obtain a finger cap, an email dated August

23 reports that, although they did not have the exact date, Kennedy had picked up a finger cap from Concentra. Dr. Page reported that, at a second IME that he performed on September 11, Kennedy informed him that she "did obtain a gel cap but she does not wear that."

On January 24, Kennedy went to her personal physician complaining that the cold temperature in the repacking area where she was working caused her ring finger to be even more sensitive. He restricted her from working in cold, and Flint moved her to a warmer area where she continued to work with small parts, welding them with an automatic welding machine.

On February 15, Kennedy injured her right wrist. She was seen at the Concentra clinic on February 16 where she reported that she had "felt a snap" in her right thumb and wrist. The clinic restricted use of the right hand and referred her to Dr. Villafane who saw her on March 8. He administered a steroid injection, restricted Kennedy to one-handed work, and directed that she return in 2 weeks. The Company assigned Kennedy to perform filing work. She could perform this work with one hand. She was aware that the work was temporary.

Kennedy claims that, at the appointment with Dr. Villafane, she showed him a portion of the IME and that he expressed his opinion that "a finger cap would make my finger worse." Kennedy did not claim that she ever reported that conversation to the Company. No document from Dr. Villafane states that opinion. I do not credit that testimony. If Dr. Villafane had disagreed with the recommendation that Kennedy obtain a finger cap, I have no doubt that she would have informed the Company of his disagreement.

Kennedy did not keep her follow-up appointment with Dr. Villafane. She sought and received permission to see Dr. Gupta. On March 21 Kennedy met with Dr. Gupta. Kennedy reported to Dr. Gupta that her right wrist was still "a little sore." He noted that it might take 6 weeks to experience the full effects of the steroid injection. He mentioned the possibility of surgery and continued her current restriction to one handed work. Kennedy recalls informing Dr. Gupta that she was only using the thumb and index and middle finger of her left hand "to grip and grab," and that was "starting to cause some pain in my left hand." There is no evidence that the Company was aware of that complaint. There is no record of any report by Dr. Gupta regarding this visit. Unlike her visit with Dr. Villafane, Kennedy does not claim that she showed Dr. Gupta any portion of the IME report. There was, so far as this record shows, no discussion of the use of a finger cap with Dr. Gupta.

Kennedy testified that Flint agreed that the Company would continue to work with her restrictions; however, it is apparent that this conversation related to the light duty restriction initially imposed by Dr. Villafane following the steroid injection and continued by Dr. Gupta following her first visit to him regarding her right wrist. Confirmation of my finding in this regard is Kennedy's testimony that, following that conversation, she continued with filing for "weeks."

Kennedy saw Dr. Gupta again on April 14. A written report of that visit notes that Kennedy could not "use her left hand very well" and had "been using the right hand more and that hand is getting worse." He advised that Kennedy "should be on a left hand no work restriction and with the right hand she should be only on light duty work with no repetitive motion type of work and no use of vibratory tools."

The following day, April 15, a Friday, Kennedy gave Flint a note from Gupta that stated her restrictions. She told him that the filing work was "near completion," and asked "what else I was going to do." Flint mentioned the possibility of cleaning. She was to "get back with him" before he went on vacation, but "we missed each other."

Flint was on vacation from April 17 to 25. During his absence, Kennedy was assigned cleaning duties and, on one occasion, drove a Company pickup truck from Plant 2 to Plant 4 to deliver parts.

On his return from vacation, Flint assigned Kennedy to assist in labeling containers and began "following up" on items that needed to be addressed. In the course of the week, he met with General Manager Chris Speece and Safety and Workers' Compensation Manager Virgette Sutton. Sutton had, on January 17, been informed by the Company's workers' compensation administrator that, consistent with the December 2010 IME, that Kennedy needed to obtain a finger cap or be permanently assigned a job consistent with the left hand restriction of 3 to 4 pounds weight limit. At that time, Kennedy had no restriction on use of her right hand.

Sutton pointed out that the authorization for Kennedy to be treated by Dr. Gupta in March related only to the current problem she was experiencing with her right hand. The Company's insurer, as confirmed by the January 17 letter that Kennedy denied receiving, had placed her claim relating to her injured left hand in inactive status. Dr. Gupta's restrictions for the left hand "were unsolicited and unauthorized by our workers' comp coverage . . . he was to treat the right hand, only . . . [but] the Company was presented with left hand restrictions as well as right hand restrictions." Sutton explained that it was "very difficult in a manufacturing environment to accommodate very strict restrictions on both upper extremities" and at that time there were no jobs that would accommodate the restrictions imposed by Dr. Gupta.

Sutton recommended that the Company "stand behind our independent medical exam of full use of the left hand, with the finger cap that we had, numerous times, instructed Ms. Kennedy to get." Thus, Kennedy would perform "full duty with the left hand, with the finger cap, and we would honor the restrictions of the right hand from the treating physician, Dr. Gupta." Sutton recommended that Flint inform Kennedy of the foregoing decision and that, if she "chose not to follow those restrictions, that we would place her on a leave of absence."

General Manager Speece explained that the Company had sought to accommodate Kennedy by finding jobs that "her restrictions would allow her to do, looking for value-added jobs that she could work at." Upon learning of the restrictions imposed by Dr. Gupta, he agreed with Sutton that Kennedy be permitted to work, but, consistent with the IME report, she could perform without restriction of the left hand if she obtained a finger cap.

Flint confirmed that he, Sutton, and Speece agreed that, with the restrictions imposed by Dr. Gupta, there was no way that Kennedy could "do anything in this plant."

Flint, Speece, and Sutton all acknowledged that they were aware of Kennedy's union sympathies and each credibly denied that their knowledge in that regard affected their decision.

On Tuesday, May 3, Flint met with Kennedy and informed her that the Company "can't honor" the restriction of no work with her left hand, that "they were going to go on the IME restriction." He explained that, if she was unwilling to work under the IME restriction, she would have to go on medical leave. Kennedy replied she felt that she should be able to work under Gupta's restrictions. Flint replied that she would "be placed on leave."

Kennedy filled out the necessary paperwork and was placed on medical leave on

May 3. On June 30, the Company confirmed that work was available consistent with the IME report relating to her left hand, i.e., no restriction if a finger cap was used, and a report from Dr. Gupta dated June 13 that restricted use of the right hand to light duty with no repetitive motion or vibratory tools.

In a letter dated July 7, Kennedy responded to the June 30 letter from the Company, stating that the Respondent "would not fully honor my current restrictions." It states that a finger cap has "been mentioned but never provided." Kennedy then states that she "does not believe that I will be able to tolerate a cap." The implication that the Respondent was responsible for providing the finger cap has no merit. The Company's insurer had been paying for the treatment of her injuries. If she had been given a prescription, she would not have expected the Company to have it filled. She would have obtained what was needed and then made a claim. Kennedy knew that obtaining a cap was her responsibility. She claims to have sought but been unable to find a finger cap and then ceased any effort to obtain one.

Kennedy recalls having several conversations with Flint relating to the Union. She believed the first conversation was in February, which was before she had any contact with the Union. She informed Flint that she had heard some rumors, "some talk about starting a union drive." She asked some questions pertaining to pay raises and "treatment of employees out on the floor, other conditions." She recalls that Flint responded that he did not "think the UAW was good at L&W. He thought it was good the way it currently was going." Kennedy claims that Flint further commented that he liked "his job the way it was, and if we got a union into the plant, we wouldn't have the open-door policy and I wouldn't be able just to come in and speak to him. We would have a union representative." Kennedy denied that Flint threatened her in any way.

Flint recalled that Kennedy did speak with him about rumors of union activity and mentioned pay and how employees "were being treated." He did not recall his response, but he "most likely" would have asked what supervisor was "doing this." Flint's purported comment relating to the open-door policy is not alleged in the complaint as a Section 8(a)(1) violation. He did not address it in his testimony; thus, that issue was not fully litigated.

Kennedy claims that she informed Flint of her involvement with the Union on April 26, the Tuesday following his return from vacation. She states that a fellow employee, Mary Bird, reported to her that Flint and General Manager Speece had questioned her regarding the Union. Kennedy recalled that she told Flint that "if he had any questions or if he wanted any information, to not bother Ms. Bird, he could come directly to me, and I would inform him as I saw fit." According to Kennedy, Flint replied that it looked like she was the "head of the whole union drive." Kennedy answered, "[Y]es, I am the head of the UAW drive."

Flint acknowledges that Kennedy did approach him with regard to the claimed inappropriate contact with Bird by himself and Speece. He responded that they did not do anything that was incorrect, "I know what I can and can't do." Bird did not testify, and there is no allegation of coercive interrogation in the complaint.

Contrary to Kennedy, Flint testified that he became aware of Kennedy's involvement with the Union almost a month prior to the conversation regarding employee Bird, as a result of a conversation they had in early April while Kennedy was performing work filing pursuant to the restrictions upon her right hand following the steroid injection. Flint spoke with Kennedy in his office. He did not recall whether the meeting related to Kennedy's failure to obtain a finger cap or an insurance issue. In the course of the conversation, Kennedy stated that she was "unhappy with L&W," that she had been there 15 years and dreaded "coming to work every

morning.” She stated, “I'm the one trying to get the Union in here," noting that "it could help her politically if she could get the Union in at L&W,” that “if she ever decided to run for a political office in the city of Inkster, that she would have the Union backing.” Kennedy, in her direct testimony, did not mention the foregoing early April conversation.

Kennedy, recalled in rebuttal to address the foregoing conversation, acknowledged stating that she was unhappy coming to work because of the pain she was in. Although pointing out that she did not live in Inkster, she did not deny making the statement relating to running for political office. She admitted that, in the conversation, she mentioned that “politics interest me” and that “the UAW had political backing.” She did not deny that, in that conversation, she told Flint that “I'm the one trying to get the Union in here."

A timeline kept by Sutton notes that a conversation occurred between Flint and Kennedy regarding obtaining a follow-up appointment with Dr. Gupta on April 12. Neither Flint nor Kennedy mentioned any discussion relating to obtaining a follow-up appointment in the conversation in which Kennedy expressed unhappiness coming to work, an interest in politics, and involvement with the Union. Flint placed that conversation in early April, which coincides with her meetings with union representatives. I credit Flint and find that the Company knew of Kennedy’s support of the Union in early April.

Paul Johnson, Vice President of Local 174, received a file in early April from another union officer that contained the names of employees at L&W who wanted to organize. Kennedy was one of the employees. He spoke with her individually and thereafter at a meeting at which other employees were present. On four occasions: April 17 and April 29 and May 5 and 18, the Union engaged in leafleting at the plant. The leafleting was conducted by Johnson and other “union members.” Kennedy did not participate. There were, of course, no “members” at the Company. Although Kennedy told Flint in early April that she was “the one trying to get the Union in here," Johnson did not single her out as the prime employee organizer at the Company.

On Wednesday, April 27, following the first leafleting by the Union, General Manager Speece conducted a plant-wide meeting relating to various issues. He commented upon the presence of organizational activity. He projected an authorization card onto a screen. Kennedy recalled that Speece stated that “if you sign this card, you'll be signing away all your rights.” Speece recalls that he told the employees that they would be “passing your decision making off to the Union by signing off on that card.” I credit Speece. Kennedy interpreted his statement as “signing away all your rights.” Neither statement is alleged as a violation of the Act.

Following the meeting, Kennedy asked Flint whether the Union could come in and speak to the employees. Flint told her, “No.”

The Respondent’s brief notes that Flint was on the Company bargaining committee in negotiations with the UAW that resulted in a long term collective bargaining agreement at a sister company at which Flint formerly worked and is currently working.

B. Analysis and Concluding Findings

1. Preliminary Findings

The injury to the left ring finger sustained by Charging Party Charmaine Kennedy evokes sympathy. Kennedy was, however, not compliant with the medical directives she received.

Whether Kennedy finally obtained a finger cap, as reported by Concentra and as she told Dr. Page at the September 11 IME, or whether, as she testified, she never obtained a finger cap after her claimed two unsuccessful attempts to obtain one is immaterial. The critical fact is that she never attempted to work using a finger cap.

I have not credited the testimony of Kennedy that she showed a portion of the IME to Dr. Villafane and that he stated that "a finger cap would make my finger worse." There is no evidence that she informed the Respondent of Dr. Villafane's opinion, and Dr. Villafane never reported that opinion.

With regard to her right wrist, after receiving the steroid injection on March 8, Kennedy failed to keep her next appointment with Dr. Villafane. When Kennedy sought treatment with Dr. Gupta in March, the authorization related only to her right wrist. Consistent with the IME report, the insurer had closed the claim relating to Kennedy's left hand in January. She had, when referred for treatment regarding her right wrist, made no complaint to the Company relating to her left hand which she was using consistent with Dr. Villafane's restrictions. So far as the record shows, Kennedy never discussed the use of a finger cap with Dr. Gupta.

The complaint contains no independent Section 8(a)(1) allegations. Notwithstanding that fact, the General Counsel argues that Flint's statement relating to the open-door policy establishes animus. Kennedy testified that Flint informed her that "if we got a union into the plant, we wouldn't have the open-door policy and I wouldn't be able just to come in and speak to him. We would have a union representative." An open-door policy is a working condition. See *Parts Depot, Inc.* 332 NLRB 670, 673 (2000). Thus, a statement that an open-door policy would be abolished threatens a change in working conditions. This issue was not fully litigated. Flint was not questioned regarding the statement that Kennedy attributed to him.

The Respondent had no notice that this evidence relating to potential Section 8(a)(1) conduct was going to be presented. I note my disapproval of the absence of notice to the Respondent. Nevertheless, Board precedent is clear that I may not ignore such evidence relating to animus. *U.S. Rubber Co.*, 93 NLRB 1232, 1233, fn. 2 (1951). Thus, I am compelled to find that the comment establishes the element of animus. The participation of Flint in successful bargaining negotiations does not alter the foregoing finding.

2. Placement on medical leave

The complaint alleges that the Respondent placed Kennedy on medical leave because of her union activities. Pursuant to *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). cert. denied 455 U.S. 989 (1982), the General Counsel is required to show by a preponderance of the evidence that animus against protected conduct was a motivating factor in the employer's conduct. Once that showing has been made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

In the case herein, although there is no evidence of affirmative actions by Kennedy, such as solicitation of union authorization cards or participation in leafleting, her statement to Flint in early April that she was "the one trying to get the Union in here" establishes that the Respondent was aware of her union activity. Speece and Sutton both admitted knowledge. I note that, although Vice President Johnson confirmed that Kennedy met with him individually and at a meeting with other employees, he did not identify her as the prime organizer at L&M.

As noted above, I am compelled to find that Flint's unalleged comment relating to the

open-door policy establishes animus.

Insofar as Kennedy was concerned, the refusal of the Respondent to honor the restrictions imposed by Dr. Gupta constituted an adverse employment action.

The Respondent was willing to honor the restrictions imposed upon Kennedy's right hand by Dr. Gupta, but was unwilling to honor his restriction of no work with the left hand. The no work with the left hand restriction of April 14, which Kennedy presented to the Respondent on April 15, was the first occasion upon which that restriction was imposed. It was contrary to the 3-pound restriction imposed by Dr. Villafane as well as the IME which reported that, with a finger cap, Kennedy could perform full duty. The Respondent required that Kennedy request medical leave when she refused to work consistent with the findings of the IME relative to her left hand.

Kennedy had, in 2010, sought a second opinion regarding the treatment she was receiving from Dr. Villafane. On October 4, 2010, Dr. Fritz confirmed to Kennedy that the treatment being given by Dr. Villafane was proper and did not change the restrictions he had imposed. Kennedy then sought a third opinion. Kennedy's seeking a third opinion casts doubt upon her assertion that she simply wanted confirmation of the treatment being given by Dr. Villafane rather than a change in her restrictions.

The third opinion was given by Dr. Gupta in his report of November 11, 2010. Contrary to the report of Dr. Gupta that Kennedy was permanently disabled in the left hand, she admitted using her left hand when repacking parts as well as when using the automatic welding machine. She could drive and perform domestic chores. Dr. Gupta's report of November 11, 2010, did not set out any work restrictions.

The IME occurred when the Respondent and its insurance carrier were presented with inconsistent medical reports. That occurred well before any union activity. Dr. Villafane had restricted Kennedy's use of her left hand. Dr. Gupta, in his report of November 11, 2010, stated that she was permanently disabled with the left hand. Notwithstanding his opinion in that regard, the report does not include a percentage of disability or state any work restriction.

The Respondent had not made an issue of the IME report that Kennedy should be able to perform unrestricted work if she obtained a finger cap for her left ring finger while Kennedy, who had unrestricted use of her dominant right hand, was performing productive repacking work. Flint repeatedly urged Kennedy to obtain a finger cap, but she did not do so.

The events in April do not, as the General Counsel argues, establish that the Respondent's requirement that Kennedy obtain a finger cap and work without restriction with her left hand establish discrimination. The General Counsel's argument is predicated upon Kennedy's testimony that she informed Flint of her involvement with the Union in late April. Contrary to that testimony, I have found that the Respondent was fully aware of her support of the Union in early April as a result of the conversation relating to her potential political ambitions, to which she did not testify on direct examination.

Prior to April 14, there had been no restriction upon both of Kennedy's hands. Kennedy did not keep her follow-up appointment with Dr. Villafane after receiving the steroid injection. She again saw Dr. Gupta. There is no report from Gupta in the record with regard to her visit to him on March 21. Dr. Gupta had been authorized to evaluate only the right hand. On April 14, Dr. Gupta restricted use of Kennedy's left hand to "no work" and "with the right hand she should be only on light duty work with no repetitive motion type of work and no use of

vibratory tools." The left hand restriction was contrary to Kennedy's admissions regarding her use of her left hand.

Upon Flint's return from vacation, he, Speece, and Sutton met to discuss the restrictions imposed by Dr. Gupta. Speece credibly testified that the Respondent had sought to accommodate Kennedy by finding jobs that "her restrictions would allow her to do, looking for value-added jobs that she could work at." Sutton explained that it is "very difficult in a manufacturing environment to accommodate very strict restrictions on both upper extremities." Flint confirmed that he, Sutton, and Speece agreed that, with the restrictions imposed by Dr. Gupta, there was no way that Kennedy could "do anything in this plant."

The General Counsel presented no evidence that there was, with Dr. Gupta's restrictions, any productive work that Kennedy could perform. The brief of the General Counsel asserts that there was work "in the repack area, a truck to drive, light cleaning to be done, and containers to be labeled." Kennedy acknowledged that she used her left hand when repacking. The fact that the Respondent found something for Kennedy to do while its human resources professional, Flint, was on vacation, does not establish that there was regular productive work that she could perform within the restrictions imposed by Dr. Gupta. She drove a truck once. That was not a regular job. How "light cleaning" could be performed without the use of both hands is not explained. A broom and dustpan require the use of both hands. Labeling requires repetitive motion. The fact that the Respondent assigned various odd jobs to Kennedy during the week that he was on vacation and catching up when he returned does not establish the existence of work that could be performed within the restrictions imposed by Dr. Gupta.

The precipitating event with regard to Kennedy being required to take medical leave was not her union activity but the restrictions which she presented to the Respondent on April 15. Contrary to the assertion in the brief of the General Counsel, Kennedy did not offer to work under the restrictions the Respondent had "previously been honoring." She demanded that the Respondent honor the restriction of "no work with the left hand," as she states in an addendum she attached to her request for medical leave. Contrary to the assertion in the brief of the General Counsel, the Respondent did not enforce the finding of the IME after Kennedy "'outed' herself as the employee responsible for the union organizing drive." That occurred in early April in the conversation to which Kennedy did not testify on direct examination. Nothing changed in Kennedy's working conditions following her early April conversation with Flint. On April 15, she presented the restrictions imposed by Dr. Gupta to the Respondent which, for the first time, restricted any use of her left hand. If those restrictions were honored, as Flint testified, there was no way that Kennedy could "do anything in this plant" insofar as she could do no work with her left hand and "only light duty . . . work with no repetitive motion . . . and no use of vibratory tools" with her right hand.

The Company was under no obligation to honor the restrictions of no work with the left hand imposed by Dr. Gupta. Kennedy had made no report to the Respondent of any additional problem with the left hand with which she had been working, within the restrictions imposed by Dr. Villafane, for over a year. Dr. Villafane and the IME of Dr. Page permitted work with the left hand. Kennedy admitted using her left hand when working.

I have credited the testimony of Flint, Speece, and Sutton that the decision that Kennedy work consistent with the IME report relating to her left hand was unrelated to their knowledge of her support of the Union. Kennedy insisted upon the restrictions imposed by Dr. Gupta. She was not discharged. She was placed on medical leave. She was seen again by Dr. Gupta on June 13, who repeated his restriction of no work with the left hand and "only light duty type of work with no repetitive motion type of work and no use of vibratory tools." The Respondent

repeated its offer of employment consistent with the IME, no restriction of the left hand if a finger cap was used, on June 30. A second IME performed on September 21 repeats the absence of restriction if a finger cap is used.

Kennedy refused to attempt to work with a finger cap. She was required to take medical leave. Her letter of July 7 states that she "does not believe that I will be able to tolerate a cap." The failure of Kennedy to attempt to work with a finger cap meant that her ability to work without restriction of her left hand if she used a finger cap was never evaluated. Had she obtained the finger cap and been unable to work with it, she would have reported that inability to the Respondent and, dependent upon further examination, any additional appropriate restrictions could have been prescribed.

The Respondent has established that the action it took with regard to Kennedy was unrelated to her union activity.

Conclusion of Law

The Respondent did not violate the National Labor Relations Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., December 5, 2011.

George Carson II
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.